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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. MINH SINDEY DINH, Defendant and Appellant.	C085808 (Super. Ct. No. 15F06076)

Following a jury trial, defendant Minh Sindey Dinh was found guilty of second degree murder and attempted murder, with enhancements for personally discharging a firearm causing great bodily injury and personally discharging a firearm causing death. He was sentenced to nine years plus 65 years to life in state prison.

On appeal, he contends: 1) the matter must be remanded to allow the trial court to exercise its discretion whether to strike the firearm enhancements; 2) restitution for tutoring services formerly provided by the victim was improper and any failure to preserve the claim regarding restitution constituted ineffective assistance of counsel; and

3) there is an error in the abstract regarding presentence credits. We shall remand for the exercise of discretion on the enhancements, order a correction to the abstract, and otherwise affirm.

BACKGROUND

We briefly summarize the facts of defendant's crimes as they are not relevant to the disposition of this appeal.

Bryan Palomares lived in an apartment with his girlfriend Arissa Pannyasee and their infant son. Palomares and defendant were friends; defendant stored his handgun at Palomares's apartment. The gun suddenly went missing after Stephen Pannyasee visited the apartment. Palomares suspected Stephen Pannyasee of taking it.

Palomares, defendant, and Anthony Sayabouipheth later confronted Stephen Pannyasee about the missing gun and assaulted him with fists and a pool cue after he denied taking it. Stephen Pannyasee sustained a black eye and needed stitches. He was driven to the hospital by codefendant Thung Hicks.

Palomares, defendant, their girlfriends, and Sayabouipheth went to a local restaurant for dinner one evening. Hicks was also at the restaurant with another party; hard looks were exchanged between the two groups. Palomares, who knew Hicks was Stephen Pannyasee's best friend, thought there might be trouble.

When Hicks and his group left the restaurant, Palomares and Sayabouipheth followed them in defendant's car. They then drove past Hicks's home before returning to the restaurant to finish their meal. Hicks later returned with a large group of people and confronted Palomares, defendant, and Sayabouipheth just outside the restaurant. As the confrontation escalated, defendant pulled out a gun. The restaurant manager came out and the two groups left.

The following day, Palomares was playing video games at his apartment with Sayabouipheth and two other people when someone knocked loudly on the front door.

Palomares looked through the peephole and saw Hicks with codefendant Thank Tran.[1] Hicks called out that he wanted Palomares to come out and explain why they had driven by his house the prior night. Hicks and Tran left when no one responded.

Palomares called defendant and told him that Hicks had come over, and it was defendant's problem to fix; defendant said he would come over. Palomares, the others from his apartment, and a neighbor walked outside by the parking lot, where they were met by defendant. Hicks and Tran drove into the parking lot, parking on the opposite side from defendant's car.

Hicks walked up to Palomares and spoke to him in a confrontational manner. Tran pulled a handgun from his waistband. Defendant exited his car with an assault rifle, firing a warning shot into the ground. Hicks exclaimed, "[O]h, you think I'm scared." Many shots were fired as people ran. Tran was shot by defendant and fell down. Eighteen-year-old Z. W. was shot in the head and killed by a stray bullet while he was in his bedroom in a nearby apartment. Tran was confined to a wheelchair as a result of being shot.

DISCUSSION

I

Exercise Of Discretion To Strike Enhancements

Defendant contends the case should be remanded to allow the trial court to determine whether it should exercise its discretion to strike the Penal Code[2] section 12022.53 enhancements for personally discharging a firearm causing great bodily injury and personally discharging a firearm causing death.

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[1] While Tran is the victim in the attempted murder count, he is also a codefendant so we refer to him by his full name.

[2] Undesignated statutory references are to the Penal Code.

On October 11, 2017, the Governor signed Senate Bill No. 620. As relevant here, Senate Bill No. 620 provides that, effective January 1, 2018, section 12022.53 is amended to permit the trial court to strike an enhancement for personally using (§ 12022.53, subd. (b)) or personally and intentionally discharging (*id*. subd. (c)) a firearm. The new provision states as follows: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, § 2.) Prior to this amendment, an enhancement under section 12022.53 was mandatory and could not be stricken in the interests of justice. (See former § 12022.53, subd. (h) (Stats. 2010, ch. 711); *People v. Felix* (2003) 108 Cal.App.4th 994, 999.)

The amendment to section 12022.53 applies retroactively to cases not final on appeal. (*People v. Arredondo* (2018) 21 Cal.App.5th 493, 507; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091.) When a trial court is unaware of sentencing discretion, the appropriate remedy is to remand for the court to exercise its discretion. (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.)

The People agree the changes enacted by Senate Bill No. 620 apply retroactively, but argue remand is unnecessary because the trial court's comments at sentencing show it would not exercise its discretion to strike the enhancements. We disagree.

At sentencing, defendant submitted documents relevant to a future parole hearing pursuant to section 3051 and *People v. Franklin* (2016) 63 Cal.4th 261. This included a report by Dr. Bruce Ebert, a forensic psychologist who did a write up of defendant's psychosocial background and drew certain conclusions.

Before pronouncing sentence on defendant, the trial court stated:

"Under Rule of Court 4.421, subdivision (a), subdivision (1), the Probation Department did find the following circumstance[s] in aggravation: That the crime

involved great violence, great bodily harm, and threat of great bodily harm, and other acts involving a high degree of cruelty, viciousness, or callousness.

"I would agree although typically that circumstance in aggravation you are able to take a part or a word or a phrase from that and apply it to a circumstance, it seems to me that [defendant's] actions in this case encompassed each of those descriptors. This crime and his activity did involve great violence, great bodily harm, the threat of other bodily harm as [the prosecutor] has suggested, this is a midday occurrence in a populated public area. The chance for tremendous harm was obvious, and it unfortunately occurred. These acts do disclose a high degree of cruelty, viciousness, and callousness. [Defendant's] actions certainly fit within that description.

"Under Rule of Court 4.421 subdivision (b) subdivision (1), the defendant engaged in violent conduct which indicates he is a serious danger to society. There is no doubt in my mind that this circumstance applies as well.

"Anyone who would unleash a barrage of metal from the firearm that [defendant] possessed in that circumstance, the danger to society cannot be calculated.

"Dr. Ebert's conclusion at the end of the report, that the reason for this situation is merely that [defendant] is immature defies any notion of reality. That would suggest that any other 21-year-old in [defendant's] position would possibly involve him or herself in the same type of circumstance which is obviously ludicrous. It also suggests and fails to explain why 25, 30, 35-year-olds, 40-year-olds likewise involve themselves in crimes of great violence.

"To explain this conduct on the basis of immaturity, and if he were just older, certainly nothing like this would happen, would be to explain the theory of relativity by adding 2 and 2. That is a ludicrous conclusion, in my view.

"Those acts alone and by themselves do indicate that this defendant poses a significant serious danger to our society.

"The Probation Department did find the following facts in mitigation, and I agree that both of them are true. Under Rule 4.423 the defendant has no prior record of criminal conduct. Under section (b)(1), and under Rule 4.408, the defendant is youthful at age 21.

"However, given the nature, seriousness, and circumstances of this offense, I find that the circumstances in aggravation do not outweigh the circumstances in mitigation."

The court's statements regarding the nature of the offense, of defendant, of the mitigating factors, and the weighing of those factors do indicate that it found him worthy of a lengthy sentence. However, they do not show that the trial court intended to impose the maximum sentence under any circumstance, or that it would not exercise its discretion to strike one or both of the gun enhancements if given the opportunity to do so.

The trial court's statements render this a close case but we shall remand to allow the trial court to determine whether to exercise its discretion on the firearm enhancements.

II

Restitution

Defendant contends the award of $57,600 to Z. W.'s family for care and tutoring services for Z. W.'s family members after the murder was erroneous as it was not supported by evidence of actual economic loss.

The probation report contains a victim impact statement and claim for restitution from Z. W.'s family. The impact statement stated that Z. W. was 18 years old and had just entered college when he was murdered. The family came from China and struggled in America due to little education and a lack of written and verbal fluency in English. Those difficulties slowly diminished as Z. W. grew older and became socially acclimated. "He helped read, write, and translate for us. He helped his brother with homework and took care of him. The many struggles we once overcame are slowly creeping back with his absence."

The family sought $93,650 in restitution, consisting of $24,000 for afterschool care for Z. W.'s younger brother ($500 per month for the time the brother was ages 10 to 14), $33,600 for tutoring services ($350 per month for when the younger brother was ages 10 to 18), and $29,050 for funeral costs and $7,000 for lost wages for the parents.[3]

At sentencing, defendant's counsel raised a general objection to $57,600 in restitution for afterschool care and tutoring and stated that the trial court could rule on the matter at that time or the matter could be determined at a later restitution hearing involving restitution for Tran as well. The prosecutor stated he wanted restitution to be addressed at that time, and defense counsel said nothing more about a future restitution hearing. The prosecutor related that the family came up with the tutoring portion of the $57,000 sum from tutoring services provided by other family members. The prosecutor submitted on the probation report and informed the court that the family was present if it had any questions for them. The trial court awarded restitution for the full $93,650 sought by the family.

Defendant contends the award of restitution for home care and tutoring services was improper because there was no evidence the family paid for afterschool care or tutoring and since some of this tutoring and care would be in the future. The People claim the argument is forfeited by failing to object to the alleged lack of evidence at the sentencing hearing. Since defendant contends any failure to preserve the issue on appeal constitutes ineffective assistance of counsel, we address his claim on the merits.

"[I]n every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim . . . in an amount established by court order, based on the amount of loss claimed by the victim . . . or any other showing to the court." (§ 1202.4, subd. (f).) The

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[3] Defendant does not contest the restitution for lost wages and funeral costs.

restitution order "shall be of a dollar amount that is sufficient to fully reimburse the victim . . . for every determined economic loss incurred as the result of the defendant's criminal conduct." (§ 1202.4, subd. (f)(3).)

At a victim restitution hearing, the People may make a prima facie case for restitution based on the victim's testimony or on some other claim or statement as to the amount of his or her economic loss. (*People v. Millard* (2009) 175 Cal.App.4th 7, 26.) Once the People have made a prima facie case for restitution, the burden shifts to the defendant to " 'demonstrate' " that the true amount of the loss is different from that claimed by the victim. (*Ibid*.) The standard of proof at the hearing is preponderance of the evidence. (*Ibid*.)

A restitution order is reviewed under the abuse of discretion standard. (*People v. Giordano* (2007) 42 Cal.4th 644, 663.) The trial court abuses its discretion when it acts contrary to law (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297-1298) or fails to use "a rational method that could reasonably be said to make the victim whole, and may not make an order which is arbitrary or capricious" (*People v. Thygesen* (1999) 69 Cal.App.4th 988, 992). " 'When there is a factual and rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court.' " (*People v. Mearns* (2002) 97 Cal.App.4th 493, 499.)

Z. W.'s family had limited English skills, and the parents could not provide afterschool care for their 10-year-old son. Z. W. assisted his family by taking care of his brother after school and tutoring him. The murder of Z. W. deprived his family of these services. Since the murder, the family had used family members as a temporary relief for afterschool care and had not hired tutors, but this does not defeat their restitution claim. A claim of loss by the victim is sufficient, so long as it provides a factual and rational basis for the restitution order. The claim of $300 per month for afterschool care and $500 per month for tutoring is not, on its face, excessive, and neither is it excessive or irrational to seek afterschool care for the boy until he is 14 or tutoring until he is 18.

Defendant claims that there is no record of the family paying such costs for the two years from the murder to the restitution hearing.[4] He also argues that any restitution for expenses incurred after the sentencing hearing, such as tutoring and afterschool care, is improper as it involves only a potential economic loss. We disagree.

As has been held repeatedly, a victim's right to restitution is to be broadly and liberally construed. (*People v. Sy* (2014) 223 Cal.App.4th 44, 63; *People v. Mearns*, *supra*, 97 Cal.App.4th at p. 500.) "The term 'economic losses' is also accorded an expansive interpretation. [Citation.] The term is not limited to out-of-pocket losses." (*People v. Williams* (2010) 184 Cal.App.4th 142, 147.) The fact that Z. W.'s brother was not tutored from the time of Z. W.'s murder to the restitution hearing does not mean the family did not incur a loss, it means only that they could not find or afford a substitute for Z. W.'s tutoring. Likewise, the fact that family members provided afterschool care for Z. W.'s brother between the murder and the sentencing hearing does not mean that the family did not incur a loss for being deprived of Z. W.'s childcare services by his murder or that those services were not worth $300 per month.

The fact that some of the restitution was for economic losses to be incurred in the future does not call the restitution order into question. The trial court may order victim restitution to cover future economic losses. "Many, if not all, of the categories of loss compensable as direct restitution include losses that are incurred after the occurrence of the crime, and which may continue to be incurred for a substantial period of time following a restitution hearing." (*People v. Giordano*, *supra*, 42 Cal.4th at pp. 657-658.)

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[4] Z. W.'s brother was 12 years old when the family submitted the restitution claim, while the family sought restitution for tutoring and day care for the boy since he was 10, his age when defendant murdered his brother.

The People submitted the victims' claim of loss, which provided a prima facie case for restitution. Since defendant presented no contrary evidence, the restitution order for the full amount sought was not an abuse of discretion.[5]

III

Correction To Abstract

The trial court awarded 697 days of presentence credit, but the abstract of judgment shows zero days. Defendant, with the People's agreement, points out this error. We shall order a correction to the abstract.

DISPOSITION

The matter is remanded to the trial court to consider whether to exercise its discretion to strike defendant's firearm enhancements. The judgment is otherwise affirmed. The trial court is further directed to amend the abstract of judgment to reflect the award of 697 actual days of presentence credit and to forward a certified copy to the Department of Corrections and Rehabilitation.

/s/
Robie, J.

We concur:

/s/
Hull, Acting P. J.

/s/
Renner, J.

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5 Any claim that the failure to provide contrary evidence at the sentencing hearing was ineffective assistance fails; there is nothing in the record indicating that any such evidence exists, so the record on appeal could not support the necessary prejudice for an ineffective assistance claim. (See *People v. Mickel* (2016) 2 Cal.5th 181, 198 [defendant must affirmatively prove prejudice to establish ineffective assistance].)